



# Globalization of Secured Lending Law: Australian Developments

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## I. Introduction

The Australian personal property security law landscape approximately resembles the United States' landscape in the pre-Article 9 years.<sup>1</sup> It is a patchwork system of statutory rules coupled with common law and equitable principles. There are numerous forms of security arrangements, and the tendency is for the law to regulate them according to their form rather than their substance. In other words, the rules vary depending on factors that, for the most part, lack any sound basis in policy or commercial practice. Registration is required in some cases as a way of dealing with competing claims, but the law is piecemeal. In this sense, the commitment to registration has been insufficient. While there are numerous registration statutes directed at different types of transactions, registration requirements for the same type of transaction vary from state to state.<sup>2</sup> In this sense, the commitment to registration has been excessive. In short, there are both gaps and overlaps in the current requirements for registration. This means that, in some cases, there are no provisions for registration at all, while in others the same security interest must be registered more than once.

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1. See GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965).

2. The main statutes are as follows. *Commonwealth*: Air Navigation Act, 1920, Designs Act, 1906, Life Insurance Act, 1995, Patents Act, 1990, Shipping Registration Act, 1981, Trade Marks Act, 1995. *New South Wales*: Bills of Sale Act, 1898, Corporations Law, Liens on Crops and Wool and Stock Mortgages Act, 1898, Registration of Interests in Goods Act, 1986. *Victoria*: Chattel Securities Act, 1987, Corporations Law. *Western Australia*: Bills of Sale Act, 1899, Chattel Securities Act, 1987, Corporations Law. *South Australia*: Bills of Sale Act, 1886, Corporations Law, Goods Securities Act, 1986, Liens on Fruit Act, 1923, Stock Mortgages and Wool Liens Act, 1924. *Tasmania*: Bills of Sale Act, 1900, Corporations Law, Motor Vehicle Securities Act, 1984, Stock, Wool and Crop Mortgages Act, 1930. *Queensland*: Bills of Sale and Other Instruments Act, 1955, Corporations Law, Liens on Crops of Sugar Cane Act, 1931, Motor Vehicles Securities Act, 1986. *Australian Capital Territory*: Corporations Law, Instruments Act, 1933, Registration of Interests in Goods Act, 1990. *Northern Territory*: Corporations Law, Instruments Act, 1935, Registration of Interests in Motor Vehicles and Other Goods Act, 1989. This list is reproduced from Australia New Zealand Banking Law Association Personal Property Securities Law Reform Committee, Policy Paper: A New Personal Property Security Law for Australia (unpublished) (Sept. 1999), Annexure 1.

Some registration statutes include priority rules for resolving competing claims to collateral, while others do not. Where there is no provision for registration, or where the relevant registration statute does not include priority rules, common law rules apply. The statutory priority rules vary from one statutory scheme to another, so that at this level too, there is no coherent pattern of regulation. In the cases where registration statutes overlap, there is the potential for a transaction to be governed by conflicting sets of priority rules. The nonstatutory priority rules are a mix of common law and equitable inputs codified and modified in part by the sale of goods legislation. The rules have developed piecemeal over the centuries, and they turn for the most part on formal considerations (such as whether the competing interests are legal or equitable in nature). The rules in many respects are unsystematic, uncertain, and outdated.

Part II below discusses in more detail what is wrong with the current Australian laws. Part III describes the reform initiatives that have been taken to date and explains why they have been mostly unsuccessful. Part IV looks at a recent High Court of Australia decision that indicates the need for reform. Part V makes some concluding observations.

## II. Defects in the Current Law

### A. REGISTRATION

#### 1. *Introduction*

The current registration requirements are unsatisfactory for three main reasons: (1) they are piecemeal in their application, (2) they overlap in a way that results in duplication of effort on the part of registrants and searchers, and (3) they are outdated.

#### 2. *Piecemeal Registration Requirements*

The current registration requirements are piecemeal. Whether registration is required turns on a number of variables, including: (1) the status of the debtor, (2) the nature of the collateral, and (3) the form of the security arrangement.

The most important example of a registration requirement that turns on the debtor's status is the Corporations Law, Chapter 2K. This Chapter creates a debtors' name-indexed register of security interests for the benefit of prospective creditors. It requires the registration of "charges" (including mortgages) over certain kinds of personal property, but only if the debtor is a corporation. There is no corresponding requirement for registration in the case of a business debtor who is not incorporated. There is no reason in principle for the limitation and the explanation for it is mainly a historical one.<sup>3</sup>

Examples of registration requirements that turn on the nature of the collateral include the following. First, in some states, an assignment of goods, whether absolute or by way of security, may be registrable under the bills of sale legislation. The bills of sale statutes are based on mid-nineteenth century English reforms. Their purpose was the familiar one of protecting creditors against secret transfers. They require the registration of a written bill of sale that allows the assignor to remain in possession of the goods, but gives the assignee a power of seizure. The legislation is limited to goods. It does not cover assignments of other kinds of personal property, except in Queensland, where it extends to assignments of book debts.<sup>4</sup> Second, the Corporations Law, Chapter 2K, requires the registration of com-

3. See *infra* text accompanying note 20.

4. Bills of Sale and Other Instruments Act, 1955 (Queensl.), as amended by Bills of Sale and Other Securities Amendment Act, 1999 (Queensl.).

pany charges, but only in relation to certain kinds of collateral. For example, while a charge on a book debt (receivable) is registrable, a charge on a nontrade debt (for example, a bank account) probably is not. Again, there is no requirement for a registration of a charge on an insurance policy held by a corporation. A charge on shares or other securities held by a corporation is registrable, but there are significant exceptions.<sup>5</sup>

Third, there are numerous specialized debtors' name-indexed registers that only apply to security interests given over specific kinds of collateral. Some of these statutes were originally enacted to facilitate the financing of particular activities (most notably, farming). Examples include the registration requirements in most states relating to security interests in livestock, wool and growing crops, sugar cane (Queensland), and fruit (South Australia).<sup>6</sup> Others owe their origins to the fact that there was a title registration scheme already in existence or contemplation, so provision for the registration of security interests as well was a relatively easy matter. Examples include the registration requirements for ships and patents.<sup>7</sup>

An example of a registration requirement that turns on the form of the security arrangement is the Corporations Law, Chapter 2K. As already mentioned, a charge (including a mortgage) given by a corporation over specified kinds of collateral is registrable. However, the legislation does not cover other kinds of transactions that are functionally indistinguishable from charges and mortgages. Most importantly, it does not cover title retention arrangements. This means, for example, that conditional sale and lease agreements are not subject to registration. Similarly, while the legislation requires registration of a charge on a book debt (receivable), a factoring agreement is not registrable even if the assignment is with recourse. Similar criticisms can be leveled at the bills of sale legislation mentioned earlier. This legislation covers an assignment of goods without transfer whether by way of security or otherwise. However, it does not cover a charge because a charge is a hypothecation and not a transfer security. Nor does it cover conditional sale or hire-purchase agreements because these are title retention arrangements, not transfers. In fact, both the conditional sale and the hire-purchase agreement resulted from the deliberate exploitation of this shortcoming in the legislation.<sup>8</sup> In Queensland and South Australia only, the bills of sale legislation has been extended to cover charges. In Queensland only, it has also been extended to cover hire-purchase agreements.

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5. The following is registrable:

- (g) a charge on a marketable security, not being:
  - (i) a charge created in whole or part by the deposit of a document of title to the marketable security; or
  - (ii) a mortgage under which the marketable security is registered in the name of the chargee or a person nominated by the chargee.

Corporations Law, 1990, § 262(1)(g) (Austl.).

The purpose of the exceptions is to prevent the registration requirement from unduly impeding portfolio management (change of investments). Registration under the Corporations Law is mandatory. There would be no need for the exceptions if registration were optional (as in the case of Article 9), and if it were possible to register a security interest in shares held by the debtor at large without having to specify particulars in the registration notice (again, as in the case of Article 9).

6. For citations to the relevant legislation, see *supra* note 2.

7. For citations to the relevant legislation, see *supra* note 2.

8. See *McEntire v. Crossley*, [1895] App. Cas. 457 (H.L.).

### 3. *Overlapping Registration Requirements*

Current registration requirements overlap. This situation results in the need for either multiple registrations or multiple searches. There are two types of overlap problems: (1) where the same security interest is subject to different registration statutes within the one jurisdiction, and (2) where there is corresponding legislation in more than one state, and each state has a separate register.

The first type is exemplified by *Australian Cent. Credit Union v. Commonwealth Bank of Australia*.<sup>9</sup> This case involved competing security interests in a motor vehicle given by a corporation. The first security interest was registered under the Goods Securities Act of 1986<sup>10</sup> (a statute providing for the registration of motor vehicle security interests), but not the Companies Code (now Corporations Law, Chapter 2K, which provides for the registration of company charges). The second security interest (a floating charge over the whole of the debtor's undertaking, including the motor vehicle) was registered under the Companies Code, but not the Goods Securities Act. Each statute enacted a priority rule that favored the first to register, but neither stated which rule was to take precedence in the event of a conflict. The trial judge held that in the absence of any such provision, the priority rules in the Goods Securities Act took precedence over the Companies Code. This conclusion was overturned on appeal. The appellate court majority concluded that it was the rules in the Companies Code that prevailed. It further held that the bank was not fixed with constructive notice of the credit union's security interest, for the purposes of the priority rules in the Companies Code, by virtue of the fact that it had been registered under the Goods Securities Act. This conclusion favors searchers over security holders in the sense that it requires a security holder to register twice in order to be sure of protection, while enabling a searcher to obtain protection by searching only once. The opposite conclusion (which was advocated by the minority) would have led to the opposite problem. Security holders would then be favored over searchers, in the sense that one registration would be sufficient, whereas a searcher would need to search in both registers to be sure of its position.

The second type of overlap is exemplified by *Douglas Fin. Consultants Pty Ltd. v. Price (DFC)*.<sup>11</sup> *DFC* concerned the familiar situation of a motor vehicle, which was subject to a security interest created in state A, being removed by the debtor to state B before being sold. The motor vehicle securities legislation in each state provides for the registration of security interests in motor vehicles. It also provides, in effect, that (subject to some exceptions) a registered security interest will not be extinguished if a third party purchases the vehicle. The question in *DFC* was whether registration of a security interest in state A protects the credit provider if the vehicle is sold in state B. There was no statutory conflict of laws rule, and the court answered the question in the negative. This holding meant that a credit provider had to register its security interest in each state to be sure of obtaining nationwide protection. If *DFC* had been decided the other way, then registration in one state would have been sufficient, but then there would be the reverse problem of searchers having to search each state register in order to be sure of their position. State legislatures

9. See *Australian Cent. Credit Union v. Commonwealth Bank of Australia*, (1990) 54 S.A. St. R. 135; reversed (1991) ASC § 56-037.

10. Goods Securities Act, 1986 (S. Austl.).

11. See *Douglas Fin. Consultants Pty Ltd. v. Price*, (1991) 1 Q.R. 243.

have moved recently to address the problem, not by enacting complementary conflict of laws rules as Article 9 does, but by computer-linking the registers to facilitate one-stop registrations and searches.<sup>12</sup>

#### 4. *Outdated Registration Requirements*

Many of the existing registration statutes are outdated. The bills of sale laws provide the clearest example. The legislation is clumsily drafted, heavy-handed, and archaic. It also varies significantly from state to state. Generally speaking, the legislation only applies where, under the bill of sale, the grantor is entitled to retain possession of the goods and the grantee has a power of seizure. Except in Tasmania, there is an exemption for motor vehicle security interests (which are covered by the motor vehicle securities statutes). In South Australia and the Australian Capital Territory, failure to register invalidates a bill of sale against the official receiver or trustee in bankruptcy of the grantor and certain other named parties. Otherwise, the validity of the bill is not affected. In Queensland, failure to register invalidates the bill of sale against all third parties, but not as between the parties themselves. In Tasmania and the Northern Territory, nonregistration invalidates the bill entirely. The New South Wales legislation distinguishes between a trader's bill of sale and others. A trader's bill of sale is a bill of sale given as security by a trader over goods owned and used by the trader in the trader's business. An unregistered nontrader's bill of sale is invalid against certain third parties, but it remains valid between the grantor and grantee. An unregistered trader's bill is wholly invalid.

The bills of sale legislation imposes certain other requirements. In South Australia, a bill of sale must be executed in duplicate and attested to by at least one witness. In Queensland, the instrument must contain the parties' names, descriptions and places of residence or business, a general description of the goods or their type, and a description of the place where the goods are situated. The Australian Capital Territory legislation requires a description of the grantor's and witnesses' residences and occupations. The Northern Territory Act provides that a signature to a bill of sale may be witnessed by a person over the age of eighteen. Witnesses must write legibly, and type or stamp their name and address or telephone number below their signature. In New South Wales, a trader's bill of sale must contain the names of, and certain other particulars relating to, the parties, a description of the goods and a statement indicating where they are situated, details relating to the consideration for the bill, and an address for the sending of notices and caveats. The trader must furnish a statutory declaration that attests to the trader's business and identifies the bill of sale as a trader's bill of sale. A bill of sale that fails to comply with these requirements is not properly registered, so that the consequences attaching to nonregistration apply. In the Australian Capital Territory and the Northern Territory, a bill of sale given by a married person over household furniture is unenforceable by seizure and sale without the spouse's consent or endorsement at the time the bill is executed. In New South Wales, the grantor of a security bill must make a statutory declaration stating the grantor's interest in the goods and whether money is already owing to any other person with respect to the purchase or on the security of the goods. Failure to comply means that the bill of sale is invalid against any such person, but otherwise the bill is valid.

12. See Anthony J. Duggan, *Personal Property Security Law Reform: The Australian Experience to Date*, 27 CAN. BUS. L.J. 176, 190-94 (1996).

## B. PRIORITY RULES

### 1. *Introduction*

The current priority rules are unsystematic. They vary depending on: (1) whether or not registration is required, (2) the form of the security transaction, and (3) the nature of the collateral.

### 2. *Statutory and Common Law Priority Rules*

Some registration statutes contain priority rules to determine disputes between competing registrable interests (Corporations Law, Chapter 2K), while others do not (the bills of sale legislation in most states). In the absence of statutory priority rules, the common law rules apply. The various statutory rules represent a departure from the common law position, but they are also different as between themselves.

### 3. *The Corporations Law Notice Rule*

The Corporations Law, Chapter 2K, contains priority rules for resolving a conflict between two or more registrable charges. The rules are based on the legislation governing registration of title deeds for old law (non-Torrens system) land. As between competing registered interests, the rule is that priority depends on the order of registration. However, this first-to-register rule is displaced where the later charge was the first one to be registered and the holder of the later charge had notice of the earlier charge at the time the later charge was created. "Notice" includes constructive notice. This rule detracts from the paramountcy of the register and increases uncertainty in commercial transactions. Race statutes, like Article 9, have the advantage over notice statutes, like the Corporations Law, Chapter 2K, in this respect.

### 4. *Priority for Future Advances*

The rules in the Corporations Law, Chapter 2K, governing priority for future advances (quaintly known as tacking) are also unsatisfactory. Priority turns on whether the charge specifies the maximum amount of "prospective liabilities" (possible future advances) or leaves the prospective liabilities unspecified, and whether the lodged notice of the charge indicates the nature or maximum amount of the prospective liabilities. Priority can also depend on whether the holder of the first charge had actual knowledge of the later charge when making the advance. A further factor is whether there was an obligation to make the future advance. Part of the rationale is that if the register discloses the maximum amount that may be lent under the umbrella of the security, a searcher will be able to determine the extent to which the company's assets are committed to the security holder. However, this rationale has been undermined by the widespread practice of specifying artificially high maximum amounts of prospective liabilities. This secures for the creditor the full protection of registration, while at the same time preserving flexibility with respect to future lending decisions. It also results in the information disclosed on the register being virtually meaningless so far as the searcher is concerned. The Corporations Law, Chapter 2K, only applies if the debtor is a corporation. Where the debtor is not a corporation, a different set of "tacking" rules applies. A's security interest will have priority over B in respect of A's further advance in any one of three cases: (1) if A and B agree on this result, (2) if A had no actual notice of B's security interest at the time of making the further advance, or (3) where A's

loan agreement with the debtor obliges A to make the further advance.<sup>13</sup> If the collateral is a motor vehicle, then the rules may be different again. The motor vehicle securities legislation, in some states, establishes that the priority A obtains by registering its security interest in the motor vehicle securities register extends to all further advances, subject to any subordination agreement between A and B.<sup>14</sup> This rule reflects the Article 9 position. Queensland recently adopted a similar rule in its bills of sale legislation.<sup>15</sup>

#### 5. *The Motor Vehicle Securities Legislation*

Motor vehicle securities legislation in all states includes priority rules for resolving competing interests of the holder of a security interest registered in the motor vehicle securities register and a third-party purchaser. In some states, there are also provisions governing priority between two or more competing security interests. These provisions enact a first-to-register rule. As mentioned above, they also state that priority extends to future advances subject to any subordination agreement between the secured parties. In other words, the motor vehicle securities legislation, in contrast to Corporations Law, Chapter 2K, follows the Article 9 lead. There is a potential for overlap between the motor vehicle securities legislation and the Corporations Law, Chapter 2K (as in the case where the debtor, being a corporation, creates a charge on a motor vehicle). The motor vehicle securities legislation defers to the Corporations Law, Chapter 2K, in such cases. This has the limited consequence of removing uncertainty about which set of priority rules applies. It does not avoid the need for dual registration.<sup>16</sup>

#### 6. *Common Law Priority Rules*

Where there are no applicable statutory priority rules, priority disputes will be determined by reference to common law principles. For example, in the case of competing interests of the holder of a security interest in goods (A) and a later third-party purchaser (B), the starting point is the maxim, *nemo dat qui non habet* (No one can give what they do not have). However, the final outcome turns substantially on the form of the agreement between A and the debtor. For example, if it is a security agreement in the strict sense (a mortgage or charge), it will be relevant to know whether A's interest is legal or equitable. If it is a legal interest, then the application of the *nemo dat* rule will mean that B obtains (at best) whatever equitable interest the debtor held in the collateral at the date of the agreement with B. By contrast, if A's interest is only an equitable one, then the *nemo dat* rule is displaced, and B will obtain a clear title if B transacted with the debtor in good faith and without notice of A's prior interest. If the transaction between A and the debtor was a conditional sale agreement, the *nemo dat* rule will not apply. It is displaced by the "buyer in possession" provision in the sale of goods legislation. This gives B clear title upon delivery if B purchased the goods in good faith and without notice of A's prior entitlement.<sup>17</sup> If the transaction between A and the debtor is a lease or hire-purchase agreement, the debtor is not a buyer, and so the buyer in possession provision does not apply. The *nemo dat* rule governs, and so B will take the goods subject to A's prior entitlement.<sup>18</sup> In the case of a

13. See, e.g., Property Law Act, 1958 § 94 (Vict.).

14. See, e.g., Chattel Securities Act, 1987 §10 (Vict.).

15. See Bills of Sale and Other Instruments Act, 1955 (Queensl.), as amended by Bills of Sale and Other Securities Amendment Act, 1999 § 18(4) and (5) (Queensl.).

16. See *supra* text accompanying note 9.

17. See *Lee v. Butler*, [1893] 2 Q.B. 318 (Eng. C.A.).

18. See *Helby v. Matthews*, [1895] App. Cas. 471 (H.L.).

lease, it makes no difference whether the transaction is in substance a security agreement or whether it is a true contract of hire. Priority contests between competing security interests are subject to a similar interplay between the *nemo dat* rule and equitable principles.

#### 7. *Chattel Securities (Victoria and Western Australia)*

The chattel securities legislation in Victoria and Western Australia displaces the *nemo dat* rule in the case of low value transactions.<sup>19</sup> The legislation says that where A has a security interest in the goods and B purchases them, B obtains clear title provided B transacted in good faith and without notice of A's prior interest. The rule applies without regard to the form of A's security agreement with the debtor. It applies to dealings in goods of any kind up to a \$20,000 limit, measured by the price B pays. In other states, there is a corresponding rule, but it is limited to motor vehicles, and where the collateral is a motor vehicle, A can protect its interest by registration in the motor vehicle securities register.

#### 8. *Choices in Action*

In the case of a dispute involving competing claims to goods, the governing rules are as described above. However, where the collateral is a debt or other "choses in action" (intangible), the starting point in the absence of any applicable statute is the rule in *Dearle v. Hall*.<sup>20</sup> This rule says that where there are successive mortgages or assignments of an existing equitable entitlement, priority depends on the order in which the competing claimants gave notice of their interests to the trustee. In the case of an assignment of a debt, the rule translates to the proposition that priority goes to whoever first notifies the debtor. Notification of the debtor is a surrogate for registration. It amounts to public notice of the claimant's entitlement.

#### C. SUMMARY

The Queensland Law Reform Commission (QLRC) and the Law Reform Commission of Victoria (VLRC) in a joint discussion paper on personal property security law reform summarized the shortcomings of the current Australian laws as follows:<sup>21</sup>

- Transactions are regulated according to their form rather than their substance. The rights of the immediate parties and third parties are made to turn on variables that have no basis in policy or commercial convenience.
- Existing registration requirements are piecemeal. They discriminate irrationally between different kinds of transactions, different classes of debtors, and different kinds of collateral.
- On the other hand, there is excessive overlap between registration statutes. Some transactions are subject to more than one registration requirement in the same jurisdiction, while others are subject to separate (though similar) requirements from state to state. The consequence of overlap is duplication of effort on the part of either registrants or searchers (depending on what rule is employed for dealing with the overlap).

19. Chattel Securities Act, 1987 § 7 (Vict.); and Chattel Securities Act, 1987 § 7 (W. Austl.).

20. *Dearle v. Hall*, All E.R. Rep. 28 (1824-34); and 38 Eng. Rep. 475 (1828).

21. See *Personal Property Securities Law: A Blueprint for Reform* (QLRC DP No. 39 and VLRC DP No. 28, 1992), para. 2.3.1. Text accompanying notes 1-20 draws substantially on this discussion paper, which was co-written by the author.



- In many cases, the registration process is unduly cumbersome, while the consequences of failing to register are heavy-handed. In both respects, the existing law adds needlessly to the cost of doing business and it impedes the free flow of transactions.
- Priority rules are an uneasy mix of statutory, common law, and equitable inputs. The overall picture is one of inconsistency and unpredictability. Some of the statutory rules detract from the paramountcy of the register and are needlessly complicated, while the nonstatutory rules are excessively reliant on formal (technical) considerations.

### III. Reform Proposals

#### A. INTRODUCTION

The history of Australian proposals for personal property security law reform is long and tortured. Article 9-type reforms were recommended by an Australian Law Council Committee (the Molomby Committee) as long ago as 1971, in the context of a comprehensive review of consumer credit laws.<sup>22</sup> The proposals were never acted on. However, they were not entirely unproductive. The Molomby Committee report eventually led to the enactment of uniform state consumer credit legislation.<sup>23</sup> The credit legislation includes provisions relating to the enforcement of consumer security agreements. It adopts the Article 9 approach of treating transactions according to their substance. The legislation covers all consumer transactions intended as security, regardless of form. As in the case of Article 9, the parties are free to adopt whatever form of transaction they choose, but the form they choose does not determine the statutory outcome. The definition of "security interest" is derived from Article 9.

The Molomby Committee proposals also led to the enactment of the state motor vehicle securities statutes. This legislation establishes in each state an asset-indexed register of motor vehicle security interests mainly for the protection of prospective buyers. It incorporates features borrowed from Article 9, including: (1) a generic concept of security similar to the credit laws, (2) a registration system based on notice filing, and (3) in two states, Victoria and Western Australia, adoption of the key Article 9 concepts of attachment and perfection. Queensland amended its bills of sale legislation in 1999 to incorporate some Article 9 features, including: (1) a centralized and modernized register, (2) notice filing in place of document filing, and (3) a first-to-register priority rule that extends to further advances.<sup>24</sup> In other respects, though, the Queensland legislation retains its nineteenth century flavor.

The Molomby Committee's recommendations for comprehensive reform were preempted by the enactment of the registration of charges provisions in the Companies Code (now Corporations Law, Chapter 2K).

#### B. THE LAW REFORM COMMISSIONS

In 1989, the New Zealand Law Commission published a report recommending the adoption in New Zealand of Article 9-type legislation.<sup>25</sup> The report included a draft statute that

22. COMMITTEE OF THE LAW COUNCIL OF AUSTRALIA, REPORT TO THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA ON FAIR CONSUMER CREDIT LAWS 1971, ch. 5.9-5.15.

23. For example, see Consumer Credit Code (Queensl.) and corresponding legislation in other states and territories.

24. Bills of Sale and Other Securities Amendment Act, 1999, pt. 2 (Queensl.).

25. NEW ZEALAND LAW COMM'N, A PERSONAL PROPERTY SECURITIES ACT FOR NEW ZEALAND: REPORT No. 8 (1989).

was modeled on the then-current version of the British Columbia Personal Property Security Act.<sup>26</sup> In May 1990, the Australian Law Reform Commission (ALRC) was given a reference by the Commonwealth attorney general on personal property securities. The reference included the object of harmonizing Australian and New Zealand personal property securities law and it directed the ALRC to take account of the New Zealand Law Commission's report. The law reform commissions of New South Wales (NSWLRC), Victoria (VLRC), and Queensland (QLRC) were also given references on the subject by their respective attorneys general. The idea was that the four commissions would work cooperatively and produce a joint report.

Initially, it was agreed that the ALRC should have prime carriage of the work. However, as the project developed, the QLRC and VLRC began to have misgivings about aspects of the ALRC's thinking on the topic. The issues were debated between the commissions frequently and at length, but the differences could not be resolved. Eventually, the VLRC and QLRC decided to publish their own discussion paper. This appeared in August 1992.<sup>27</sup> A week later the ALRC, in conjunction with the NSWLRC, published its discussion paper.<sup>28</sup> In May 1993, the ALRC, this time without the NSWLRC, published a report.<sup>29</sup> In the end, there was substantial common ground among the four commissions and they all subscribed to the case for reform. However, there were two important areas of disagreement. The first had to do with drafting, while the second was concerned with whether the reforms should be introduced federally or at the state level.

### C. THE DRAFTING ISSUE

The QLRC and VLRC argued that any new Australian legislation should be based on the text of one of the North American models. This was not to say that the wording should be slavishly copied, but that the model should be departed from only where necessary to cater to differences in local conditions and requirements. This philosophy is consistent with the approach the Canadian provinces took in modeling their personal property security statutes on Article 9. Radical departure from the Article 9–Canadian PPSA text would involve reinventing the wheel. The QLRC and VLRC opposed reinventing the wheel, not least because to do so would mean loss of the opportunity for Australia to take advantage of the North American case law and literature. Furthermore, a radically different drafting approach increases the likelihood of error. Article 9 has been tried and tested and, as the Canadian experience demonstrates, it is exportable into a system based largely on English common law. New legislation, drafted in haste, might not work as well—or at all. A decision to reinvent the wheel puts a premium on knowing what you are doing and why.<sup>30</sup> The ALRC's view was that the Article 9–Canadian PPSA model was unsuitable for adoption in Australia because it was too radically different in both substance and drafting style from

26. Personal Property Security Act, S.B.C., 1989, ch. 36 (B.C.).

27. See *A Blueprint for Reform*, *supra* note 21.

28. AUSTRALIAN LAW REFORM COMMISSION AND NEW SOUTH WALES LAW REFORM COMMISSION, PERSONAL PROPERTY SECURITIES (ALRC Discussion Paper No. 52 and NSWLRC Discussion Paper No. 28).

29. AUSTRALIAN LAW REFORM COMMISSION, PERSONAL PROPERTY SECURITIES (Report No. 64).

30. See Jacob S. Ziegel, *Canadian Perspectives on Chattel Security Law Reform in the United Kingdom*, 54 CAMBRIDGE L.J. 430, 441 (1995).

current Australian laws. The ALRC preferred to reinvent the wheel. It produced a draft bill that looked nothing like Article 9 or the Canadian PPSA statutes. The ALRC was roundly criticized for its efforts by its North American consultants.<sup>31</sup> The ALRC draft bill was never adopted.

#### D. THE FEDERAL LAW-STATE LAW ISSUE

The ALRC is a federal body charged with oversight of federal laws. Not surprisingly, it favored implementing the reforms in federal legislation. The trouble is that comprehensive personal property securities legislation lies beyond the constitutional reach of the federal Parliament. The best that could be achieved at the federal level is legislation covering security interests created by corporate debtors, based on the power of the Parliament to make laws with respect to corporations. The ALRC, in recognition of this limitation, recommended including the reforms in the Corporations Law in substitution for the registration of company charges provisions. It expressed the hope that the states would enact mirror-image statutes to cover security interests given by noncorporate debtors. That way, the gaps in coverage would be filled. However, this scheme would require uniform legislation enacted simultaneously in all states and territories, and the ALRC failed to suggest any mechanism for coordinating the enterprise. Experience with legislation in other fields shows that, in the absence of a formal cooperative arrangement between the states and the Commonwealth, the pursuit of uniformity is likely to prove elusive.

The QLRC and VLRC proposed a cooperative arrangement under which a model statute would be drafted for adoption by each of the states and territories on a uniform basis. The model statute would cover security interests created by corporate and noncorporate business debtors alike. There would be a single national register of security interests, established under the cooperative arrangement, and this would serve as the register for each state and territory law. In the event that a single national register was not achievable, the commissions recommended the establishment of computer-linked state registers. The objective would be to ensure that a single filing in one state was sufficient to achieve registration in all states. Correspondingly, all registers would be covered by a single search. To the same end, the register (or registers) would be computer-linked with existing asset-indexed registers, including the registers of motor vehicle security interests and other asset-indexed systems.<sup>32</sup>

#### E. THE BANKING LAW ASSOCIATION COMMITTEE PROPOSAL

The drafting issue and the federal law-state law issue remain sticking points, but the critical problem in Australia is a lack of enthusiasm in business and legal circles for the reforms. It has proved difficult to persuade business that the costs of change are outweighed by the costs of doing nothing. A "better the devil you know" attitude prevails, particularly among the major banks. New Zealand delayed over ten years enacting its own legislation, waiting to see what Australia would do. In the end, it lost patience. The New Zealand Personal Property Securities Act was enacted in October 1999. It is based on the Saskatchewan and New Brunswick versions of the Canadian Model Personal Property Security Act.

31. See Duggan, *supra* note 12, at 181-84.

32. For a similar proposal in the U.S. context, see Douglas G. Baird, *Security Interests Reconsidered*, 80 VA. L. REV. 2249, 2253-54 (1994).

The New Zealand developments rekindled interest in Australian reform. The Australia and New Zealand Banking Law Association (BLA), a nongovernment organization comprised mainly of legal practitioners specializing in banking law, established a personal property security law reform committee (BLA committee). In September 1999, the BLA committee released a draft statute for public comment with an accompanying policy paper.<sup>33</sup> The BLA committee policy paper endorsed the QLRC and VLRC position on both the drafting issue and the federal law–state law issue. The policy paper recommended the creation of a national register of security interests to facilitate one-stop filing and searches across the country. The register would be fully computerized and it would be accessed electronically.

The policy paper recognized the importance of Australia and New Zealand “moving in the one direction on reforming personal property security law.”<sup>34</sup> The trouble is that the committee’s draft bill is based heavily on revised Article 9, whereas the New Zealand statute is based on the Canadian Model Personal Property Security Act. There are substantial differences between the two texts.<sup>35</sup> It is easy enough to understand the BLA committee’s position. It makes sense in principle to use the most recently revised text as the basis for local reform. On the other hand, the politics of the committee’s decision are more problematic. The Australian banks remain to be convinced that reform is necessary. The banks were united in their opposition to the law reform commissions’ proposals. The one new argument in support of change is the value of harmonizing Australian and New Zealand law. The BLA committee’s draft bill undermines this argument. It is hard to see the BLA committee managing to change the banks’ minds so long as it perseveres with the current draft. Predictably enough, the bill received a lukewarm reception at the BLA’s June 2000 annual conference. The Uniform Law Conference of Canada (ULCC) is considering a proposal for revision of the Canadian Model Personal Property Security Act in light of the Article 9 changes.<sup>36</sup> Australia should consider legislation based on the Canadian model statute, incorporating whatever changes the ULCC might end up agreeing to. New Zealand would probably be willing to make corresponding changes to its own legislation. At this late stage, there seems to be little prospect of persuading New Zealand to scrap its new legislation altogether in favor of revised Article 9.

#### IV. The Associated Alloys Case

*Associated Alloys Pty Ltd. v. ACN 001 452 106 Pty Ltd.*<sup>37</sup> is a recent decision of the Australian High Court dealing with the application of the registration of charges provisions in what was then Corporations Law, part 3.5 (now Chapter 2K), to the proceeds clause in a conditional sale agreement. The Corporations Law requires the registration of a charge on designated property of a company, including book debts (receivables).<sup>38</sup> “Charge” is defined as “a charge created in any way and includes a mortgage and an agreement to give or execute

33. BANKING LAW ASSOCIATION POLICY PAPER: A NEW PERSONAL PROPERTY SECURITY LAW FOR AUSTRALIA (unpublished, Sept. 17, 1999).

34. *Id.* at 12.

35. See Linda Widdup & Laurie Mayne, *New Zealand’s Personal Property Securities Act and Australia’s Draft Personal Property Securities Bill: An Introductory Comparison* (unpublished, Mar. 2, 2000).

36. See Ronald C.C. Cuming & Catherine Walsh, *Potential Changes to the Model Personal Property Security Act of the Canadian Conference on Personal Property Security Law* (unpublished, May 2000).

37. *Associated Alloys Pty Ltd. v. ACN 001 452 106 Pty Ltd.*, (2000) 171 A.L.R. 568 (Austl.).

38. See *supra* text accompanying note 5.

a charge or mortgage, whether on demand or otherwise." Failure to register means that the charge is void as against a liquidator or administrator of the company. The appellant (the seller) sold steel to the respondent (the buyer) under a series of conditional sale agreements made between 1981 and 1996. The steel was for use in the buyer's manufacturing processes. Each agreement contained a proceeds clause that read as follows:

In the event that the [buyer] uses the goods/product in some manufacturing or construction process of its own or some third party, then the [buyer] shall hold such part of the proceeds of such manufacturing or construction process as relates to the goods/product in trust for the [seller]. Such part shall be deemed to equal in dollar terms the amount owing by the [buyer] to the [seller] at the time of the receipt of such proceeds.

The buyer went into liquidation in 1996. The seller had not been fully paid and it asserted its rights under the proceeds clause against the buyer's liquidator. A conditional sale agreement itself is not a registrable charge within the meaning of the Corporations Law, for reasons that have already been discussed.<sup>39</sup> However, the buyer's liquidator argued that the proceeds clause created a charge on the buyer's book debts and it was void for non-registration. The seller argued that the proceeds clause created a trust in its favor, not a charge, and a trust is not registrable. Accordingly, the case turned on the difference in equity between a charge and a trust. This kind of dispute had been played out before the English courts in the so-called *Romalpa* cases.<sup>40</sup> The result has been an exceedingly complex body of case law on what does and does not constitute a charge. In *Associated Alloys*, the trial judge held that, despite the parties' use of trust language, the proceeds clause created a charge. The New South Wales Court of Appeal agreed. The High Court did not. It saw the key question as being whether the parties intended to create a trust and it treated their explicit use of trust language as proof that they did. "There is nothing to suggest," the court said, "that the parties in their written instrument did not mean what they said, or did not say what they meant."<sup>41</sup> Therefore, there was no reason for not taking the parties at their word or for giving the bargain a different meaning from the way the parties themselves had expressed it.<sup>42</sup> The court recognized the commercial significance of its decision, saying, "for third parties, such as financial institutions seeking to assess the credit-worthiness of the buyer, the non-registration of the proceeds subclause on a public register may cause potential difficulties."<sup>43</sup> However, it suggested that these difficulties "were capable of remedy by legislation."<sup>44</sup> "To treat the Proceeds Subclause as an agreement which falls foul of the Law is to rewrite the statute. It is not for the courts to destroy or impair property rights, such as those arising under trusts, by supplementing the list of those rights which the legislature has selected for such treatment."<sup>45</sup> Justice Kirby, in a vigorous dissent, cautioned against the "exclusive concentration on the terms of an instrument purporting to create a trust, to the neglect of an examination of the purpose and effect of the instrument when considered for its substance not merely its form."<sup>46</sup> He concluded that the proceeds sub-

39. See *supra* text accompanying note 7.

40. After the landmark decision in *Aluminium Indus. Vaassen BV v. Romalpa Aluminium Ltd.*, [1976] 1 Lloyd's Rep. 443 (Eng. C.A.).

41. *Associated Alloys*, (2000) 171 A.L.R. 568 at ¶ 35.

42. *Id.* ¶ 40.

43. *Id.* ¶ 47.

44. *Id.*

45. *Id.* ¶ 51.

46. *Id.* ¶ 92.

clause did create a registrable charge and that any other construction "would permit the easy defeat of the clear purpose of the Law."<sup>47</sup>

If *Associated Alloys* had arisen under an Article 9-type statute, it would have been disposed of easily. It probably would not have even gone to trial, and it would certainly not have run the whole gamut of the appeal process. The Article 9 response to such cases is, of course, to treat conditional sale agreements as in substance security agreements, to provide for perfection of security interests by registration or possession, and to say that where collateral gives rise to proceeds, the security interest extends to the proceeds. Under an Article 9-type regime, *Associated Alloys* would have turned simply on whether the seller had perfected its security interest. If so, then it would have had a claim to the proceeds, but not otherwise. Detailed questions of trust law and equity would not have entered into the matter. The formalism of the reasoning in *Associated Alloys* is a product of the piecemeal approach Australian law presently takes to the registration of personal property security interests. Failure to provide a comprehensive registration system is an open invitation for transactions that avoid whatever requirements happen to apply. The consequence is to reduce the reliability of the register, as the majority and minority judgments in *Associated Alloys* both recognized. The majority in *Associated Alloys* extended an invitation to the legislature in guarded terms to reform the statute. If the legislature decides to take up the invitation, the obvious course is for it to go down the Article 9 road.

## V. Conclusion

Australian personal property security law is outdated, fragmented, and excessively complex. The patchwork registration system makes it difficult for financiers in many cases to check for encumbrances on a debtor's assets. Heavy-handed and clumsy registration requirements, together with overlapping registration statutes, add unnecessarily to the costs of the registration process. Outdated priority rules increase the costs of doing business by making it hard for parties to predict the outcome of disputes without resorting to litigation. The need for reform is pressing. In the words of the BLA committee:

Many small businesses find it hard to obtain finance on the security of personal property. One of the reasons for the reluctance of financiers to take and rely on this form of security is the lack of certainty in the existing law. Due to the difficulties with taking security over receivables and inventory, financiers have tended to demand security in the form of real property, non-inventory personal property and guarantees from company directors. The present laws increase the risks for financiers and have the effect of limiting the availability of credit. In addition, the complexity of the laws increases the cost of advice on the taking and administration of securities over personal property.

Evidence in North America has shown that financiers are far more inclined to place reliance upon personal property as security when they can obtain clear rights in relation to that property.

For some considerable time the relative value of personal property compared with real property has been increasing and the primary generation of wealth in advanced economies today is derived from personal property including intangibles generally, information and ideas. A modern competitive economy must have the ability of harnessing this type of property for the purposes of raising debt capital. Also, innovative financing techniques, including securitisation, would be encouraged by more modern and flexible personal property security laws.

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47. *Id.* ¶ 95.

The present laws can no longer be justified nor can we afford to maintain them.<sup>48</sup>

The challenge is to overcome the resistance to change. American readers with long enough memories will be familiar with the problem. Karl Llewellyn encountered it repeatedly in the course of his campaign for the Uniform Commercial Code.<sup>49</sup> A solution is essential. Otherwise, Australia will find itself out of the race for business in a rapidly developing global economy.

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48. See BANKING LAW ASSOCIATION POLICY PAPER, *supra* note 33, at 7.

49. See, e.g., Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 779-80 (1953); Karl Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367 (1957).

